Human Development Association *and* New York's Health and Human Service Union, 1199/Service Employees International Union (formerly known as District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL–CIO) and District 6, International Union of Industrial, Service, Transport and Health Employees (formerly known as Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO). Case 29–CA–9367

September 29, 2006

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On May 31, 2006, Administrative Law Judge Steven Fish issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Human Development Association, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the General Counsel is entitled to summary judgment on the amount of reimbursement owed to employees for years 1981–1987, because the Respondent failed to prove that its 1981–1987 records were unavailable for reasons other than the Respondent's own negligence. Therefore, we find it unnecessary to pass on the judge's alternative finding that even if summary judgment were not appropriate, the General Counsel proved that the amounts in the specification were reasonable.

[3] Member Schaumber joins his colleagues in adopting the judge's decision, albeit reluctantly, for the reasons stated in fn. 2, supra. The 13-year delay between enforcement and the issuance of the compliance specification in this case remains difficult to fathom or excuse. Such extended delays are plainly prejudicial to the interests of affected parties and weaken the credibility of the Board in the eyes of those we protect and regulate. He trusts the Region has now implemented safeguards to prevent the recurrence of such an anomaly.

Aggie Kapelman, Esq., for the General Counsel.

Richard Howard, Esq. (Kaufman, Schneider & Bianco, LLP), of Jericho, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. This is a supplemental proceeding to determine the amount's of money due to employees of Human Development Association (Respondent), based upon the Board's decision issued on May 22, 1989 (293 NLRB 1228), subsequently enforced by the Court of Appeals on July 9, 1991.[1]

The hearing was held before me in Brooklyn, New York, on February 7 and 27, 2006. Briefs have been filed by the General Counsel and by Respondent and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, make the following:

FINDINGS OF FACT

I. FACTS

A. The Board's Decision

The Board's decision found that Respondent recognized Local 6 International Federation of Health Professionals International Longshoreman's Association, AFL–CIO (Local), as the exclusive collective-bargaining representative of its employees at a time when Local 6 did not represent a valid majority, and executed and enforced union security and check-off clauses in a collective-bargaining agreement. By such conduct the Board concluded that Respondent violated Section 8(a)(1), (2), and (3) of the Act, and ordered that Respondent reimburse unit employees, with interest, for moneys paid by or withheld from them for dues, fees and obligations of membership in Local 6.[2]

B. The Compliance Specification

On June 30, 2004, Region 29 issued a compliance specification alleging amounts of reimbursement due to 3082 claimants, of $632,962.60, plus interest. The reimbursement period, began on June 24, 1981, the date of the execution of the contract, and terminated on June 30, 1992, the date that Respondent ceased deducting dues and fees from the wages of its employees.

After several extensions of time to file its answer Respondent filed an answer on August 24, 2004, denying the amounts due, but not attaching an index with its own computations or providing an alternative theory as to how to compute amounts. Respondent did assert in a footnote that it was "still working on its computations."

On February 23, 2005, counsel for the General Counsel notified Respondent that its answer was insufficient, and granted it additional time to file an amended answer.

[1] 973 F.2d 657 (D.C. Cir. 1991), cert. denied 503 U.S. 950 (1992).

[2] There was no charge filed against Local 6, so consequently there was no complaint issued against Local 6 for its conduct in accepting recognition and dues. Therefore no Order against Local 6 to reimburse employer for dues that Local 6 presumably received as a result of the unlawful recognition and contract was issued.

Subsequently, after receiving a copy from the General Counsel of the appendix to the specification on a computer disc, Respondent filed an amended answer on March 29, 2005. The amended answer contains an appendix with the same names as those in the appendix to the specification. Next to each name, Respondent wrote, "Defendant denies knowledge or information to form a belief as to the truth of the allegations concerning this individual." Respondent also included the same footnote as in its earlier answer, asserting that it is "still working on its computations."

C. The Motion for Summary Judgment

On April 19, 2005, the General Counsel filed a Motion for Summary Judgment, contending that Respondent's answer failed to comply with the Board's Rules and Regulations.

After an order to show cause was issued, the parties submitted various documents to the Board in support of their positions. In its papers, Respondent made a cross-motion for summary judgment, alleging that the compliance specification should be dismissed because of "laches" on the part of the General Counsel; i.e. (the 13-year delay between the Court Order and the issuance of the specification.) In connection with this contention, Respondent asserted that it was prejudiced by the "laches" of the General Counsel, since the recipient of the dues, District 6 "may no longer be viable," and may not be available for Respondent to assert a claim for "contribution" *Too Inc. v. Kohl's Dept. Stores*, 213 F.R.D. 138 (S.D., N.Y. 2003). Respondent also asserted in its response to the General Counsel's motion, that Respondent had no assets to pay the claims asserted, and that it had no records in its possession in order to contest the specification filed by the General Counsel. Respondent asserted further that it had turned all its records over to counsel for the General Counsel.

On June 24, 2005, the Board issued an Order, finding that Respondent is entitled to an opportunity to review the records it has provided to the Region, and to file a second amended answer. Accordingly, the Board ordered the General Counsel to make the relevant records available to Respondent within 14 days of the Order, and gave Respondent 21 days after the last day of the 14-day period to file a second amended answer.

Respondent filed a second amended answer on August 11, 2005.[3]

On December 9, 2005, the Board issued an Order on the summary judgment motions filed by the parties. The Board denied the cross-motions to dismiss, filed by Respondent on the grounds of lack of assets and laches. With respect to the latter contention, the Board cited *NLRB v. J. H. Rutter Rex Mfg. Co.*, 369 U.S. 258 (1969), and Board precedent, *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002); *Hubert Distributors*, 344 NLRB 339, 341–342 (2005); *Unitog Rental Services*, 318 NLRB 880, 885 (1995), affd. 105 F.3d 651 (5th Cir. 1996), to the effect that laches may not defeat the action of a Government agency in enforcing a public right, and declined "to apply laches in the instant case."[4]

The Board then ruled on the General Counsel's motion, dividing the issues into four relevant categories of employees, with different instructions depending on whether the categories are deemed to be "matters within Respondent's knowledge." Since the existing record did not enable the Board to determine which employees are included in each category, the Board remanded for a hearing to resolve these issues and to make findings consistent with the Board's views.

Category (1) in the decision refers to employees who did not use dues checkoff. As to this group, the Board concluded that the General Counsel must prove that employees used dues checkoff. If not the employee will be assumed to have paid dues directly to the Union. The amounts due to these employees will be considered not within Respondent's knowledge. Therefore, Respondent's general denial will be sufficient, summary judgment shall be denied, and evidence on the issues of the amounts due to these employees shall be taken.

Category (2) involves employees who used dues checkoff, but for whom records are unavailable for reasons other than the Respondent's negligence. As to this group, once the General Counsel shows that employees used dues checkoff, then Respondent shall have the opportunity to prove that records needed to rebut the amounts alleged in the specification are "unavailable for reasons not attributable to Respondent's own negligence." Amounts due to employees as to whom Respondent carries that burden, would also be not considered within Respondent's knowledge. Thus Respondent's second amended answer would be sufficient, summary judgment shall be denied, and evidence taken on the amounts due to these employees.

Category (3) refers to employees whom the General Counsel proves used dues checkoff and for whom records are unavailable, but for whom Respondent fails to prove that the unavailability is not attributable to its own negligence. As to these employees, the Board concluded, the allegations in the specification shall be considered matters within the Respondent's knowledge. Further the Board stated that Respondent's answer did not satisfy the specificity requirements of Rule 102.56(b) of the Board's Rules, and that summary judgment "shall" be entered for General Counsel, as to this category of employees.

Finally, Category (4) reflects employees for whom the General Counsel used dues checkoff and for whom records are available. These are matters, according to the Board that are within Respondent's knowledge, and for the same reasons as stated regarding Category (3) employees, summary judgment "shall" be entered for the General Counsel as to employees in this category.

D. The Hearing

At the trial, the General Counsel amended the compliance specification to revise amounts for several employees, and substituted a corrected summary sheet. During the course of the trial, Respondent stipulated to the amounts due to employees,

[3] Although this answer was initially rejected by the Board as untimely, upon a motion for reconsideration filed by the Respondent, the Board issued a Supplemental Order on September 14, 2005, granting the motion for reconsideration, and accepting the late filed answer.

[4] The Board did observe however, as noted by Respondent, that the 13-year delay in issuing the compliance specification "was deplorable." Id. at p. 4.

for the period from 1988–1992, periods for which it admittedly received records from the General Counsel. The General Counsel also requested, in its brief that the specification be amended to reflect two minor arithmetical recalculations. Respondent has not objected to this amendment, which is hereby granted.

Testimony was adduced during the trial from Annabell Morrison and Richard Epifanio, compliance assistant and compliance supervisor for the Region respectively, and Respondent's Executive Director Yechiel Greunwald and Richard Howard, Respondent's attorney. Various documents were also introduced into the record, including some letters from the Region concerning the sending of Respondent's records between the Region and Respondent.

The facts are essentially not in dispute, except for the issue of whether records that were initially turned over to the Region by Respondent, were ever returned to Respondent by the Region.

In early 1992, after the Court decree enforcing the Board's Order, Epifanio had conversations with Arthur Kaufman, Respondent's attorney, about how compliance would be effectuated. It was agreed between Epifanio, Kaufman, and Susan Panepento, the Board attorney assigned to the case, that Respondent would forward to the Region its records on a periodic basis in groups, and the Region would then return each group upon completing the calculations for that group of records.[5] This agreement was confirmed by a letter from Panepento to Kaufman, dated May 18, 1992, which also reflected that the Region enclosed mailing labels to be used by Respondent. The letter reads as follows:

> May 18, 1992
> Arthur Kaufman, Esq.
> Kaufman, Namess, Schneider & Rosensweig
> 425 Broad Hollow Road, Suite 315
> Melville, New York 11747
>
> Re: Human Development Assoc.
> Case No. 29–CA–9367
>
> Dear Arthur:
>
> As per your request, enclosed are mailing labels to be used only by your client to mail the requested payroll records to us.
>
> Unless more efficient records are located, it is my understanding that your client will be sending me its weekly payroll records, by as much as a payroll quarter at a time. I will then review the records and return them to the client as soon as possible. Please have the first set of records sent to us promptly.
>
> Thanks you for your cooperation.
>
> Sincerely
> Susan J. Panepento
> Board Agent

Epifanio recalled that for the first several years, from 1992 through 1994, Respondent would periodically furnish to the Region records by quarter or by year, and once the Region finished with the records, the records would be returned, and new records would be requested and sent. The Region received records covering the years 1981 through 1987. Epifanio conceded that although he recalled records being returned, he did not recall whether the agreement between Respondent and the Region (to return records after the Region was finished working on them) "was adhered to strictly." Epifanio also did not recall any specific discussion with either Panepento or Morrison at the time about sending the records back, nor did he recall whether the records were sent to Respondent's attorney or to the Respondent directly.[6] Epifanio did testify that in the facility where the office was located in those years, it did not have much room, so he would have seen the large boxes that contained the 1981–1987 records, if the Region still had them. Epifanio had no discussions with Kaufman or anyone else from Respondent, during these years, during which Respondent complained about not receiving records back, as per the arrangement that had been made. Epifanio also admitted that his inspection of the files contained no transmittal letters, referring to the 1981–1987 records. Panepento did not testify, and Morrison did not recall ever sending the 1981–1987 records back to Respondent.

However, the Region's files did contain several documents which did support Epifanio's testimony that such records were returned by the Region to Respondent. They include a letter from Panepento to Kaufman, dated July 15, 1992. It reads as follows:

> July 15, 1992
> Arthur Kaufman, Esq.
> Kaufman, Namess, Schneider & Rosensweig
> 425 Broad Hollow Road, Suite 315
> Melville, New York 11747
>
> Re: Human Development Assoc.
> Case No. 29–CA–9367
>
> Dear Arthur:
>
> Please have your client forward to us immediately the payroll records showing dues and initiation fee deductions made during 1988. The 1987 and 1986 payroll records which we still have, will be returned to HDA next week.
>
> Thank you for your cooperation.
>
> Sincerely,
> Susan J. Panepento
> Board Agent

Further Panepento also wrote a letter to Nick Fish, attorney for the Charging Party, dated May 12, 1993. It deals with a request by the Charging Party for records concerning Respondent. The letter reflects that the Region had returned the re-

[5] Kaufman informed Epifanio that Respondent wanted this arrangement, because it did not want the Region to have all the records at once. This was not a problem for the Region, since there were a large number of potential claimants, and over 10 years worth of records to review.

[6] Epifanio did testify that he spoke to Panepento at some point undisclosed in this record, presumably after the controversy over the return of the records arose. Panepento told Epifanio that she believed that the records were returned, but she did not remember when.

cords asked for by Charging Party (for March of 1984) to Respondent. The letter states as follows:

> May 12, 1993
> Nick Fish, Esq.
> Eisner, Levy, Pollack & Ratner
> 113 University Place
> New York, New York 10003
>
> Re: Human Development Association
> Case No. 29–CA–9367
>
> Dear Nick:
>
> As per your request, enclosed is a copy of the Administrative Law Judge's decision in above-captioned case. In addition, I have checked our records, and did not find the name of any counsel other than Sipser, Weinstock, Harper & Dorn who represented District 1199, in this matter.
>
> As I indicated in our phone conversation, the Region does not have Respondent's payroll records for March 1984. These records were provided to the Region in order to calculate the dues reimbursements owed, but were returned to Respondent sometime earlier this year, or in the fall of last year. We do have a list of employees which we generated from Respondents records, but our list contains the [sic] only the names of those employees who had dues deducted, and the total amounts of dues deducted, not the exact dates of employment.
>
> A copy of this list has been given to Amy Kreiger, the Board Agent who is handling the representation case.
>
> If you have any questions, please feel free to contact me at the number listed above.
>
> Sincerely,
> Susan Panepento

Panepento again wrote to Kaufman, dated April 28, 1994. In this letter, Panepento requested records from 1988 though 1992 and stated that the Region was in possession of records from the 3rd and 4th quarter of 1988. It also reflects that the Region "secured additional staff" to work on the case.[7] This letter reads as follows:

> April 28, 1994
> Arthur Kaufman, Esq.
> Kaufman, Naness, Schneider
> Rosensweig
> 425 Broad Hollow Road
> Suite 315
> Melville, N.Y. 11747
>
> Re: Human Development Association
> Case No. 29–CA–9367
>
> Dear Mr. Kaufman:
>
> We are in possession currently of your client's payroll records for the 3rd and 4th quarter 1988, and are working on these records presently. Recently, we secured additional staff who will be working on the case. We are therefore requesting the remaining payroll records, so that we can input the data for more than one or two quarters at a time. The following records are needed:
>
> 1st Quarter 1988
> 2nd Quarter 1988
> 1989 – all four quarters
> 1990 – all four quarters
> 1991 – all four quarters
> 1st Quarter 1992
> 2nd Quarter 1992
>
> It is my understanding that at some point the payroll process was updated, and annual summaries may be available from that time forward, which show the dues and initiation fees paid by each employee on an annual basis. Should these annual summaries exist, they would be an acceptable alternative to the quarterly payroll records.
>
> If you have any questions, please contact me, or Mr. Epifanio, at the number listed above.
>
> Sincerely,
> Susan J. Panepento
> Attorney
> cc: Human Development Association
> 12 Heyward Street
> Brooklyn, New York 11211

As noted above, the Board Order issued in 2005. It ordered the Region to provide the records in its possession to Respondent, to enable it to file its amended answer to the specification. On July 7, 2005, the Region sent to Respondent all the records that it had at the time, which included 1988, 1989, 1990, and various quarters in 1991, 1992, and 1993.

On this occasion, the Region sent a transmittal letter signed by Board attorney Aggie Kapelman to Richard Howard, Respondent's attorney.

This letter is as follows:

> July 7, 2005
> Richard M. Howard, Esq.
> Kaufman, Schneider & Bianco, PC
> 390 North Broadway – 2nd Floor
> Jericho, New York 11753
>
> Re: Human Development Association
> Case No. 29–CA–9367
>
> Dear Mr. Howard:
>
> Pursuant to the recent Board Order this office has shipped five (5) boxes of records concerning the above-captioned case. Specifically, we have sent the quarterly records for 1988, 1989 and 1990. Shipped also are the second, third and fourth quarters of 1991, the first and second quarters of 1992 and the first quarter of 1993. Please note that all records prior to 1988 (with the exception of 1982 which was never provided) were returned previously to the client pursuant to an agreement with Arthur Kaufman. Note also that it is Respondent's responsibility to preserve all payroll and dues transmittal records and

[7] In fact, according to Epifanio, the additional staff contemplated never materialized. Thus all of the calculations on the case were done by Morrison, and were reviewed by Panepento, Epifanio, and in later years, by Board attorney Aggie Kapelman.

continue to allow the Region access to them until this case is closed.

Very truly yours,
Aggie Kapelman
Attorney
AK:ms

As noted above, Morrison was the Board employee responsible for inputting the data from Respondent's records in order to make the calculations. She began working on the case in August 1992. Morrison would enter data from Respondent's records on a spread sheet, which records reflected that dues were deducted from the salaries of employees by Respondent under a column labeled "dues." Morrison after inputting the data, helped to prepare the appendices to the specification which eventually issued.[8]

There were a few quarters, over the period of 1981 through 1992, concerning which no records were received from Respondent. For these quarters, no claims for dues were included in the backpay specification.

Morrison testified that she spent approximately 5 years on and off in inputting data and making the calculations. She also testified, corroborated by Epifanio, that she worked on the case periodically over the years, depending on the workload of the office and the instructions of Epifanio.[9]

Morrison also estimated that on average it would take about 10 hours to input data for each quarter, and that from 1981 through 1992, there were 144 quarters for which records were received and data inputted. The calculations were not completed until early 2004. After some unsuccessful settlement negotiations between Respondent and the Region, the specification was issued in June 20, 2004. The Region did not copy any of the records that it received from Respondent. According to Epifanio, there was no discussion or consideration of copying the records, because they were too extensive. Morrison testified that ordinarily records are not copied by the Region, since it usually receives copies of records from Respondents and the records are then retained in the files of the Region.

Morrison also testified that the records that the Region had were originally in the office of a Board agent, and were not placed in her office until May 1995, when the Region moved to its current location. Thus whatever records the Board had at the time of the move, were transported to the new location. Morrison also testified that she was unaware of any theft, disasters, floods, or any other event that might have caused Respondent's records that the Region had in its possession to be lost or destroyed.

Greunwald testified that he had no recollection of any records being returned to Respondent by the Region. He added that if such records had been returned, he would have known about it. However, at one point in his testimony Greunwald testified that Respondent keeps its payroll records for 7 years, to show the IRS if necessary. Later on, he changed his testimony to state the IRS requires records to be kept for 7 years, and when asked if Respondent throws out records after 7 years, Greunwald responded "not really," and then added that Respondent keeps all its records. Greunwald also admitted that Respondent did not make copies of the records that it sent to the Region.[10]

Richard Howard testified that he personally checked his law firm's file room and its office's archives, and found no records of Respondent in the law firm's possession from 1981 to 1987. Howard also testified that he spoke to his associate Arthur Kaufman, and asked if Kaufman recalled an arrangement with Panepento to send records back and forth. Kaufman did not recall such an arrangement, but told Howard that it would not surprise him that such an arrangement was made, since it makes sense that he would have said, "I'll send you some records, when you send them back. I'll send you more records."

Kaufman also informed Howard, that he had no recollection of ever receiving any records back from the Region, and it would not have been his practice to typically have records sent back to the law firm. Kaufman said that he'd "probably have them sent back to the client directly." Kaufman also informed Howard that he did not know whether records were sent by the Region to Respondent, and that he did not recall calling the Region and asking about records that Respondent had previously sent. According to Howard, Kaufman simply recalled that "he just kept sending records over. They requested records, he sent them over."

Neither Kaufman, nor Susan Panepento were called as witnesses in this proceeding. Panepento is no longer employed at the Agency. Kaufman is still employed as a partner in the law firm representing Respondent. No explanation was offered by Respondent as to why it did not call Kaufman as a witness. Similarly, no evidence was offered by the General Counsel as to why it did not call Panepento as a witness. The record also does not reveal whether Respondent made any request of the Region for the address or phone number of Panepento, so that Panepento could be subpoenaed by Respondent.

III. ANALYSIS

A. Laches

Respondent requests in its brief, as it did in its various answers, that the entire backpay specification be dismissed because of "laches" by the Board. *NLRB v. Michigan Rubber Products,* 738 F.2d 111 (6th Cir. 1984); *NLRB v. Hub Plastics Inc.,* 52 F.3d 608 (6th Cir. 1996). Respondent argues that the Board's delay of 13 years after the Court's order to prepare and issue a backpay specification is "intolerable and inexcusable," and warrants the application of the principle of laches.

However, that issue was already presented to the Board in Respondent's cross-motion for summary judgment. The Board specifically rejected Respondent's request in that regard, relying on well-established Board precedent, supported by the Supreme Court. *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 369 U.S.

[8] Initially Morrison received weekly reports from Respondent (covering the period from 1981–1985). Thereafter, the Region received quarterly reports from Respondent.

[9] The Region had a number of large compliance cases during the period of 1992–2004, which required a great deal of Morrison's time including one case with 11,000 discriminatees.

[10] I note that the Board's Order requires that Respondent "preserve . . . all payroll records . . . and other records necessary to analyze the amounts of Back Pay due."

258, 265 (1969); *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002); *Hubert Distributors,* 344 NLRB 339, 341–342 (2005); *Unitog Rental Services,* 318 NLRB 880, 885 (1995), affd. 105 F.3d 651 (5th Cir. 1995).

The Board's remand order specifically delineated the areas to be considered by me, in my decision, and it does not include any reference to the defense of laches. Therefore it would be inappropriate for me to make any recommendations on Respondent's defense of laches, and I shall not do so.

To the extent that Respondent's defense can be construed as a request for reconsideration of the Board's order, I find nothing on the record before me that would justify any change in the Board's decision. The cases cited by the Board,[11] as well as other precedent [12] establish clearly that laches is not available as a defense against the Board in its enforcement of a public right.

The cases cited by Respondent[13] do not require a different result. While in both of these cases, the sixth circuit observed that "we do not doubt that at some point laches would apply against the Board for inordinate delay in bringing an action," in neither case did the Court find laches to have applied. Thus the Court's assertion quoted above is mere dicta, and as noted above contrary to well-settled Board and Supreme Court precedent.[14]

It is also significant that these cases dealt with the issue of the propriety of issuing a bargaining order against an employer. In such bargaining order cases, some Courts will consider delay as an issue in assessing whether a bargaining order is appropriate.[15] However, these decisions consider delay as one of many factors in determining whether a bargaining order is warranted, and do not rely on the doctrine of laches. Here there is no issue of a bargaining order, but merely a question of how much reimbursement for dues unlawfully withheld by Respondent is necessary to make whole employees for Respondent's unlawful actions.

Further, even the cases cited by Respondent, require a showing of prejudice to Respondent, in order to warrant a finding of laches. Respondent has not demonstrated any prejudice to it as a result of the 13-year delay between the Court decree and the issuance of the compliance specification. In that regard, Respondent makes several arguments, none of which has any merit. Initially, Respondent asserts that the delay might have prejudiced the former employees, some of whom are probably "no longer able to be located." While that assertion may very well be true,[16] it provides no help to Respondent. While some former employees may have disappeared, and might not be available to receive any money due them, the prejudice is to these employees and not to Respondent. Indeed, to the contrary, Respondent will benefit from the long delay in these circumstances, since it could reduce the amount of money that Respondent will be compelled to pay.

Respondent also argues that it has a right of contribution from District 6, as a third party defendant, since District 6 wrongfully received the funds deducted from the salaries of Respondent's employees. *Too v. Kohl's Dept. Stores,* 213 F.R.D. 138 (S.D. N.Y. 2003); *Steiner Elec. Co. v. Central States South East,* 1995 WL 399517 (N.D., Ill., 1995); *Lodge 2424 Machinists,* 564 F.2d 66 (Ct. CL. 1977); Rule 14(a) of the FRCP. Respondent further argues that the extensive delay has "caused the inability of Respondent employer to avail itself of its contribution rights," and that the "viability of District 6 is critical in determining prejudice to the Respondent." However, Respondent has adduced no evidence issue indicating that District 6 is no longer in existence or no longer "viable." Indeed recent Board cases reflect that District 6 is still in existence, still appearing before the Board and continuing to represent employees. *ALJUD Licensed Home Care Services*, 345 NLRB 1089 (2005); *Le Marquis Hotel, LLC*, 340 NLRB 485 (2003).

Moreover, Respondent has adduced no evidence that it has made any efforts to contact District 6, or to attempt in any way to collect any money from the Union for the dues that the Union received from Respondent. There is no evidence that Respondent has filed any action against District 6 for Respondent's right of contribution based upon the fact that the Union received the dues illegally withheld from employees' salaries. Nor does the record reflect any reason why Respondent could not file such an action against the Union at this time, or even after it pays the money due under the specification.

Accordingly, based on the foregoing, I reject Respondent's request that the instant specification be dismissed based upon alleged laches of the Board.

B. Dues Checkoff

The evidence overwhelmingly demonstrates, which is not denied by Respondent, that all of the dues deductions detailed in the compliance specification were as a result of dues checkoffs. The conclusion is based on the undenied testimony of Morrison and Epifanio, as well as an examination of records submitted into evidence. Indeed even the testimony of Greunwald supports the conclusion that dues were submitted to District 6 by Respondent as a result of checkoff's executed by the employees.

Therefore, I find that there are no employees included in category (1) of the remand, i.e., employees who did not use dues checkoff.

C. The Unavailability of Records

Having found that the General Counsel has met its burden of establishing that the employees for whom it sought reimbursement used dues checkoff, the remaining issues for determina-

[11] *NLRB v. J. & H. Rutter-Rex,* supra; *Harding Glass*, supra; *Hubert Distributors,* supra; *Uritog Rental,* supra.

[12] *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1618, 1619 (2001) *Mid-State Ready Mix Inc.*, 316 NLRB 500 (1995); *Urban Laboratories, Inc.*, 308 NLRB 816, 820 (1992).

[13] *Michigan Rubber*, supra; *Hub Plastics*, supra.

[14] I also note that no case law was cited in support of the Court's view that "at some point laches would apply against the Board for inordinate delay."

[15] *Flamingo Hilton Laughlin v. NLRB*, 148 F.3d 1166, 1170–1171 (D.C. Cir. 1998); *NLRB v. Marion Rohr Corp.*, 714 F.3d 228 (2d Cir. 1983).

[16] I note that this record contains no evidence of how many, if any of the discriminatees are no longer available to the Region.

tion, revolve around whether Respondent has met its burden of establishing that records were unavailable "for reasons other than Respondent's negligence." If Respondent has met that burden, as to such records, the Motion for Summary Judgment will be denied and the amounts due decided based upon the testimony and evidence in the record.

The record discloses that records for the period from 1988–1992 were and are available. That finding would justify a granting of the General Counsel's Motion for Summary Judgment as to this period of time, based on the Board's Order. However, since the parties have stipulated to the amounts due for these years, I need not make such a finding. I shall therefore recommend pursuant to the stipulation, that the amounts due consistent with such stipulation be paid for the years 1988 through 1992.

That leaves for consideration, the records for the years 1981 through 1987. These records were not available as of the date of the trial. The issue to be determined is whether Respondent has proven that such records were unavailable "for reasons other than Respondent's negligence."

With respect to these records, it is undisputed that in the spring of 1992, an arrangement was made between Respondent and the General Counsel under which Respondent would periodically send records to the General Counsel, and after the General Counsel completed its calculations it would return the records to Respondent, who would in turn send more records to General Counsel. There is also no dispute that under this arrangement, between 1992 and 1994, Respondent furnished records for the years 1981–1987. What is in dispute is whether General Counsel complied with the agreement by returning these records to Respondent.

After carefully evaluating the conflicting and somewhat inconclusive evidence presented on this subject, I am persuaded that the General Counsel did in fact return these records to Respondent, as testified to by Epifanio. While Greunwald testified that he had no recollection of any such records being retuned to Respondent, I found his testimony to be vague, uncertain, and unpersuasive. I also note that initially Greunwald testified that Respondent kept its payroll records for 7 years, in order to show the IRS. Then on further questioning, when he realized that such an admission could lead to the conclusion that Respondent threw out records from the years 1981–1987, he changed that testimony to state that Respondent kept all its records, and that he meant to say only that the IRS requires records to be kept for 7 years. I find this to be a significant contradiction in his testimony, and an indication that Respondent did in fact receive these records from the General Counsel, and probably threw them out at some point between 1994 and 2005, when they were over 7 years old.

I recognize that Epifanio's testimony as to the return of records, is far from conclusive, but it is supported by his conversation with Panepento, and more importantly by the letters introduced into the record. I note particularly the letter of July 15, 1992, from Panepento to Kaufman. In that letter Panepento requests that Respondent forward to the General Counsel payroll records showing deductions made during parts of 1988. Significantly, the letter added that "the 1987 and 1986 payroll records which we still have, will be retuned to HDA next week." This statement not only indicates that General Counsel sent the 1987 and 1986 records to Respondent, a week after July 15, 1992, but also that the payroll records for prior years, (1981–1985), had been returned previously. While it is true, as correctly pointed out by Respondent, the record contains no transmittal letters covering the return of the 1981–1987 records, I do not find this absence controlling. I attribute this omission to sloppiness on the part of the Region, but not necessarily indicative of the fact that the records were never sent. I find it more likely that either the records were returned without a transmittal letter, or that the transmittal letters were misplaced or lost. I conclude that had the records not been returned as had been agreed upon, there would have been some complaint about it from Respondent or its attorney to the General Counsel. I note in this regard, that Kaufman had informed Epifanio that Respondent did not want General Counsel to be in possession of all of its records at one time, and that this was the reason that the General Counsel agreed to the arrangement to have records returned after calculations were made, and additional records then sent by Respondent. I therefore conclude that the failure of Respondent to assert that records had not been returned, until 2005, to be an implicit admission that the arrangement had been complied with, and that Respondent did receive the 1981–1987 records from the General Counsel.

Further support for my conclusions in this respect can be found in additional letters sent by the General Counsel. On May 12, 1993, Panepento wrote to Nick Fish, attorney for Charging Party, who had apparently requested Respondent's payroll records for March 1984.[17] In that letter Panepento informed Fish that Respondent's payroll records for 1984 were "returned to Respondent sometime earlier this year, or in the fall of last year." I find it unlikely that Panepento would make such a statement in that letter, if it was not accurate that these records were indeed returned to Respondent. This letter also supports the conclusion that I have made above, that the General Counsel did comply with the arrangement made between it and Respondent concerning the return of the records.

Finally, I also rely upon the April 28, 1994 letter from Panepento to Kaufman, requesting additional records from 1988 (1st and 2d quarters), and 1989 through 1992. In that letter Panepento states that "we are in possession currently of your client's payroll records for the 3rd and 4th quarter of 1988, and are working on these records presently." This comment, although it makes no reference to records from 1981–1987, strongly suggests that such records had previously been returned to Respondent. Thus by informing Respondent that the Region was in possession of Respondent's records for the 3d and 4th quarters of 1988, the General Counsel implicitly confirmed that it was not in possession of the 1981–1987 records, which had been returned previously, as per the parties prior arrangement, and consistent with Panepento's prior letters. I also again rely upon the failure of Respondent or its attorney to complain immediately after receiving the April 28, 1994 letter, that it had not received the 1981–1987 records, as it now asserts. I find it unlikely that Respondent would have turned over the 1988–

[17] It appears from the letter that in 1993, there was still a representation case pending.

1992 records as requested, had the General Counsel not previously returned the 1981–1987 records as agreed upon and as indicated in prior letters. I further find that had the General Counsel not returned the 1981–1987 records by April 28, 1994, that letter would have precipited a complaint or an inquiry by Respondent and or its attorney as to the whereabouts of the 1981–1987 records.

Respondent argues strenuously that an adverse inference should be drawn against the General Counsel, for its failure to call Panepento as a witness. *Segendor F. v. County of Rensselar*, 100 F.3d 270 (2d Cir. 1996); *People v. Kean*, 94 N.Y. 2d. 533 (Ct. of App. 2000). It asserts that Panepento as a former employee of the Board, is in the "power" of the Board to be produced, and that an inference is warranted that if Panepento were called as a witness, she would testify that the 1981–1987 records were never returned to Respondent by the General Counsel. I disagree.

It is well settled Board law that it is inappropriate, and in fact error, to draw an adverse inference from an Employer's failure to call a former supervisor or owner as a witness, since in such circumstances, it may not be reasonably assumed that the witness would be favorably disposed toward the Employer. *Reno-Hilton Resorts*, 326 NLRB 1421 fn. 1 (1998) (judge erred in drawing adverse inference from failure of Employer to call former officials involved in decision to subcontract.); *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998) (no adverse inference from failure to call former supervisors); *Goldsmith Motors*, 310 NLRB 1279 fn. 1 (1993) (no adverse inference drawn from failure to call former coowners); *Lancaster-Fairfield Community Hospital*, 303 NLRB 238 fn. 1 (1991) (judge erred in drawing adverse inference against Employer for failing to call former supervisor); *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987) (judge erred in drawing adverse against Employer for failure to call former senior vice president who had been fired by Employer by time of the hearing); *Lemon Drop Inn*, 264 NLRB 1007, 1025 (1984) (Judge erred by drawing adverse inference against the General Counsel for failure to call as a witness, an employee, although the judge had found that employee was "friendly to Respondent").

Therefore, since a former supervisor or former coowner, may not reasonably be assumed to be favorably disposed toward their former employer, there is no basis to conclude otherwise with respect to a former employee of the Board. Accordingly, I find it inappropriate to draw an adverse inference from the failure of General Counsel to call Panepento as a witness.[18]

I have however considered the fact that Panepento was not called as a witness in making my credibility findings above, and have considered that failure as a weakness in the General Counsel's case. Nonetheless, based upon other facts in the record described above, particularly the letters sent by the General Counsel, and Respondent's failure to object to or complain about the assertions made in these letters, I have concluded, that notwithstanding the absence of Panepento's testimony, that the General Counsel did return the 1981–1987 records to Respondent.

Indeed, if I were to draw any adverse inferences in this case, it would be against the Respondent for failure to call Arthur Kaufman, its attorney who was involved in the arrangement for the turning over of records with the General Counsel and who also received Panepento's letters on this subject. Kaufman is still a member of the law firm representing Respondent, and it is clear that it may reasonably be assumed that his testimony would be favorable to Respondent.

I shall not draw such an adverse inference however, particularly since Respondent did adduce hearsay testimony through Howard, that Kaufman did not recall receiving or being aware of such records being returned. While I did receive such testimony, which was not objected to, I place little value or weight to it, since Kaufman was not called as a witness and was not made available for cross-examination.

Finally I have similarly considered Epifanio's hearsay and unobjected to testimony that Panepento told him that she "believed" that the records were returned to Respondent, but couldn't recall when it was. I also place little value or weight to such testimony, for the same reason that I discounted Howard's testimony about Kaufman's statements to Howard about the records.

Accordingly, based upon the foregoing analysis and authorities, I conclude that Respondent has not met its burden of establishing that the unavailability of the 1981–1987 records is not attributable to its own negligence. Therefore, these matters are within Respondent's knowledge, and pursuant to the Board's remand, I find Respondent's answer to be insufficient, and that the General Counsel's Motion for Summary Judgment is granted as to the years 1981 through 1987.

Moreover, even had I found that Respondent had met its burden of proving that the unavailability of the 1981–1987 records was not attributable to its own negligence, and therefore denied the Motion for Summary Judgment, the ultimate decision here would be unchanged. Thus, such a conclusion would result in litigation of the amounts due for these years, based on the testimony and evidence on the record. In this regard, Morrison testified credibly and persuasively that all of the calculations in the specification were made by her, using records supplied by Respondent. Some of these documents were introduced into the record, which are supportive of her testimony. The numbers in the specification are reasonable, *Cable Car Charters,* 336 NLRB 927, 932 (2001), and have not been disputed or contradicted by any evidence submitted by Respondent. Accordingly, I find that General Counsel's calculations were sufficiently accurate to be accepted, particularly where no evidence was offered by Respondent to the contrary. Thus even absent a summary judgment finding, I conclude that the amounts due to employees are as set forth in the compliance specification, as amended.

These amounts are as follows:

[18] I also note that Respondent adduced no evidence that it made any attempt to subpoena Panepento or to ask the Region for Panepento's whereabouts in order to do so. There is no reason to believe that Respondent could not have been successful in subpoenaing Panepento and obtaining her testimony on the record.

1981–1987	$239,717.09
1988–1992	$403,826.09
Total Due	$643,543.18 plus interest.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[19]

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

SUPPLEMENTAL ORDER

IT IS ORDERED that the Respondent Human Development Association, Brooklyn, New York, its officers , agents, successors, and assigns, shall make whole its employees by paying a total of $643,543.18 as specified in the compliance specification, as amended, plus interest as prescribed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).